Supreme Court, U.S.
FILED
MAY 14 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1425 and 79-1447

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILDERNESS PUBLIC RIGHTS FUND, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

FREDERICK B. EISEMAN, JR., ET AL., PETITIONERS

v.

CECIL D ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

JACQUES B. GELIN
MARTIN W. MATZEN
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

Page

Opinions below 1

Jurisdiction 2

Question presented 2

Statutes involved 2

Statement 3

Argument 9

Conclusion 13

CITATIONS

Cases:

Mountain States Legal Foundation, et al. v. *Whalen, Director, National Park Service, et al.*, Civ. No. 80-0233 (D. Ariz., filed Mar. 28, 1980) 12

Udall v. *Tallman*, 380 U.S. 1 12

Udall v. *Washington, Virginia and Maryland Coach Co.*, 130 U.S. App. D.C. 171, 398 F. 2d 765, cert. denied, 393 U.S. 1017 10

Universal Interpretive Shuttle Corp. v. *Washington Metro. Area Transit Comm'n*, 393 U.S. 186 ..... 3, 10

Constitution, statutes and regulation:

United States Constitution, Fifth Amendment 7

Page

Constitution, statutes and regulation—(Continued):

Concessions Policy Act, Pub. L. No. 89-249, 79 Stat. 969, 16 U.S.C. 20 *et seq.*:

Section 1, 16 U.S.C. 20 ..... 3, 6, 7, 11

Sections 1-9, 16 U.S.C. 20-20g 10

Section 2, 16 U.S.C. 20a 7

National Park Service Act, ch. 408, 39 Stat. 535, 16 U.S.C. 1 *et seq.*:

Section 1, 16 U.S.C. 1 ..... 3, 7

Section 3, 16 U.S.C. 3 ..... 2, 3, 6, 7, 8, 10

5 U.S.C. 553 7

36 C.F.R. 7.4(h) 5

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1425

WILDERNESS PUBLIC RIGHTS FUND, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

No. 79-1447

FREDERICK B. EISEMAN, JR., ET AL., PETITIONERS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (79-1425 Pet. App. D; 79-1447 Pet. App. 20-29) is reported at 608 F. 2d 1250. The opinion of the district court in No. 79-1425 (Pet. App. C) is unreported. The opinion of the district court in No. 79-1447 is reported at 433 F. Supp. 1103.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1979. On December 17, 1979, a timely petition for rehearing was denied (79-1425 Pet. App. A; 79-1447 Pet. App. 30-31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under circumstances concededly requiring limitations on the use of the Colorado River for recreational boating within the Grand Canyon National Park, the National Park Service acted within its statutory authority in allocating use between those members of the general public with skills and equipment sufficient to undertake white-water boating on their own, and those who prefer the services of professional concessioners.

STATUTES INVOLVED

Section 3 of the National Park Service Act, ch. 408, 39 Stat. 535, 16 U.S.C. 3 provides in relevant part:

> The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service * * * . He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations * * *, but for periods not exceeding thirty years; and no natural curiosities, wonders, or objects of interest

> shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public * * *.

Section 1 of the Concessions Policy Act, Pub. L. No. 89-249, 79 Stat. 969, 16 U.S.C. 20, provides in relevant part:

> [T]he Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services as to have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused. It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas.

STATEMENT

This case involves two actions brought independently by the Wilderness Public Rights Fund ("Wilderness Fund") and Frederick B. Eiseman, Jr. *et al.* ("Eiseman") challenging the authority of the National Park Service[1] to

---

[1]The Secretary of the Interior is responsible for maintaining our national parks and for providing facilities and services for their enjoyment by the public through concessioners or otherwise. 16 U.S.C. 1, 3, 20. This responsibility is carried out principally by the National Park Service as an agency of the Department of the Interior. See *Universal Interpretive Shuttle Corp.* v. *Washington Metro Area Transit Comm'n*, 393 U.S. 186, 187 n. 1 (1968).

allocate permits for recreational boating on the Colorado River within the Grand Canyon National Park between those members of the general public with skills and equipment sufficient to undertake white-water boating on their own ("noncommercial" river runners), and those who wish or require the services of professional concessioners ("commercial" users or passengers).[2] All such river use is subject to Park Service permit, and the dispute here relates only to the apportionment made between these two classes of use.

---

[2]The terms "commercial" and "noncommercial" are defined by the Park Service as follows:

> *Commercial* Refers to boating companies who are concessioners operating under a permit from the National Park Service. These companies arrange river trips which provide a crew, equipment, and supplies to visitors for a fee. The crew operates the boats, prepares meals, sets up camp, and provides educational opportunities to learn about the area. "Commercial outfitter" is synonymous with "commercial river-running company."
>
> *Noncommercial* Refers to boaters who are skilled river runners organizing river trips with their own crew, equipment, and supplies. On these trips, the participants share the responsibilities and cost of operation of the boats along with meal preparation, and other camp duties. No fees are paid for guide services or are collected above the actual cost of the trip. Also termed "private."

Colorado River Management Plan, App. E at 1-2 (Dec. 20, 1979). Copies of the proposed plan, as well as the draft environmental statement were lodged with the court of appeals as Exhibit D to the Supplemental Brief of petitioner Wilderness Fund. For the convenience of this Court, we are lodging copies of the final plan and environmental statement with the Clerk.

1. Park Service regulation of Colorado River use is intended to protect the health and safety of river travellers as well as the natural environment. All river users must comply with provisions specifying suitable types of watercraft, emergency equipment and procedures, and measures for environmental protection (*e.g.*, fires and waste disposal). See 36 C.F.R. 7.4(h); Colorado River Management Plan, App. A-1 to A-6.

Commercial guides and trip leaders must meet more stringent standards of river running knowledge and experience than those required of noncommercial users. Management Plan App. A-4 to A-5. Noncommercial trip permits are issued only to those whose applications detail their ability to meet all equipment and experience requirements. Concessioners' operations are subject to on-river evaluations at least three times annually. *Id.* at 24.

2. In 1972 the Park Service found that increasing recreational use of the Colorado River threatened its natural environment (79-1425 Pet. App. D-2).[3] Studies were commenced to ascertain the river's carrying capacity and to formulate a comprehensive plan for its management and use. Pending completion of this effort, the Park Service placed an annual ceiling on the number of river user days,[4] and apportioned this allowable total use between commercial passengers and noncommercial river runners on the basis of actual usage by each group in 1972 (*ibid.*).

---

[3]River use for 1972 alone exceeded that of the entire 100-year period from 1870 through 1969. Management Plan, at 2.

[4]One user day equals one passenger on the river for one day.

As a result, commercial users were allotted 89,000 user days and noncommercial users 7,600 user days, or 92% and 8%, respectively, of the annual limit of 96,600 user days (*ibid.*). From 1973 through 1979, this remained the formula under which the Park Service allocated river use permits. As a result of the recently adopted Colorado River Management Plan, permits will be issued for a greatly increased level of total usage with an apportionment of roughly 70% commercial, 30% noncommercial, beginning in 1980 (79-1425 Pet. App. D-9; Management Plan at 15-22).

3. In January 1976, petitioner Wilderness Fund, a non-profit corporation whose membership includes recreational boating enthusiasts brought suit alleging that members wishing to engage in noncommercial river running were being denied "free access" to the Colorado River by the Park Service's allocation formula at a time when demand for permits had risen substantially (R. 1, 3).[5] Wilderness Fund alleged that such permit allocation was beyond the Park Service's statutory authority and contrary to the "free access" and "necessary and appropriate" clauses of 16 U.S.C. 3 and 20, respectively (R. 4). Wilderness Fund sought an injunction and stay of the issuance of permits for commercial users and a declaration that noncommercial users were entitled to priority treatment (R. 5-6).

Following discovery (R. 369-475), the district court denied a preliminary injunction and granted summary judgment for respondents (79-1425 Pet. App. C-3 to C-7). Noting that Wilderness Fund had conceded the authority

[5]"R." refers to the record on appeal.

of the Park Service to impose its limit on total river usage (*id.* at C-6), the district court concluded that allocation of total use between commercial and noncommercial river trips was equally within the broad statutory authority conferred by 16 U.S.C. 1, 3, 20 and 20a (*id.* at C-5 to C-6). The court found further that basing permit allocation on actual 1972 use was reasonable, pending study and development of a final river management plan (79-1425 Pet. App. C-6 to C-7). As to plaintiff's call for "free access," the court said (*id.* at C-7):

> While plaintiff's members are qualified to guide river trips, have access to the necessary equipment, and live in the region of the Colorado River, the [Park Service] must attempt to meet the needs of the general public.

4. *Eiseman* petitioners, individuals who had been denied noncommercial river-running permits, brought a similar action in March 1977.[6] Again, petitioners did not "contest the power and authority of the Park Service to restrict the *Total use* of the River to historical use levels * * *" (433 F. Supp. at 1106) (emphasis in original). Here too, the district court granted summary judgment, concluding (433 F. Supp. at 1106):

> [T]he allocation of usage in the interim plan has a rational basis, is within the Secretary's discretion, and furthers the legitimate governmental objective of providing for the greatest possible public enjoyment of the river experience subject to ecological, environmental and public safety limitations.

[6]Eiseman's action raised procedural (5 U.S.C. 553 and Constitutional Fifth Amendment) issues as well. Neither the district court (433 F. Supp. at 1105, 1107) nor the court of appeals (79-1447 Pet. App. 24-25, 26-28) found merit in these contentions. Petitioners no longer urge them here (79-1447 Pet. 8 n.3).

5. The cases were consolidated for argument before the court of appeals, which affirmed both in a single opinion (79-1425 Pet. App. D). The court of appeals recognized the board management authority conferred by 16 U.S.C. 3 and that its "free access' clause necessarily must be applied to protect the access of the general public and not just a particular segment thereof (*id.* at D-6 to D-7):

> In issuing permits, the Service has recognized that those who make recreational use of the river fall into two classes: those who have the skills and equipment to run the river without professional guidance and those who do not. The Service recognizes its obligation to protect the interests of both classes of users. It can hardly be faulted for doing so. If the over-all use of the river must, for the river's protection, be limited, and if the rights of all are to be recognized, then the "free access" of any user must be limited to the extent necessary to accommodate the access rights of others.

Similarly, the court found (*id.* at D-8) no "arbitrary action or abuse" of the authority to grant concessions "necessary and appropriate for public use and enjoyment," 16 U.S.C. 20, in order to provide the general public with professional assistance in running the Colorado.

Having found that the Park Service possessed the necessary statutory authority, and that its allocation of river use between these two classes of users was "not per se an arbitrary method of recognizing and accommodating the[ir] interests" (79-1425 Pet. App. D-8), the court declined to rule on the particular allocation

formula challenged below (*id.* at D-9). The court concluded that petitioners' challenges to the "specifics" of the interim management plan were mooted by reason of the Colorado River Management Plan (*ibid.*).[7]

ARGUMENT

Petitioners contend that the Secretary lacks authority to allocate users-days between commercial and noncommercial users. However, the Courts below held that the Secretary clearly has such authority. No conflict among the circuits exists on this issue. Moreover, the particular allocation scheme challenged by petitioners has been superseded by one substantially more generous to petitioners. Review by this Court is not warranted.

1. Significantly, petitioners do not challenge either the authority or the need for the Park Service to limit the total annual recreational use of the Colorado River (see 79-1425 Pet. 13). Nor do they challenge here the Service's equipment, health and safety, or environmental regulations governing river trips, or the manner in which these regulations are implemented. They recognize (79-1425 Pet. 14) that the Secretary of the Interior, acting through the National Park Service, has wide-ranging statutory responsibility and authority for managing our

---

[7]On December 20, 1979, the final management plan was approved by the Park Service. By lengthening the summer season and using limits on daily launches and trip size (rather than user days) as the key use factors, the present management plan has substantially increased both the allowable total river usage and the allocation to noncommercial users like petitioners. Under the new plan, noncommercial use is expected to increase more than 700% (as compared to 130% for commercial use) by 1982. Management Plan, at 22.

national parks and providing services for their public enjoyment through concessioners. *Universal Interpretive Shuttle Corp.* v. *Washington Metro Area Transit Comm'n*, *supra*, 393 U.S. at 187, 189. It is equally clear that the Secretary may regulate such concessioners and allocate service among them. *Udall* v. *Washington, Virginia & Maryland Coach Co.*, 398 F. 2d 765, 767, 769-770 (D.C. Cir. 1968), cert. denied, 393 U.S. 1017 (1969). See 16 U.S.C. 20-20g.

2. Contrary to petitioners' contentions, the allocation of permits on the basis of commercial and noncommercial status does not violate the "free access" clause of 16 U.S.C. 3. As the court of appeals found (79-1425 Pet. App. D-7):

> The basic face-off is not between commercial operators and the noncommercial users, but between those who can make the run without professional assistance and those who cannot.

Neither class of users can run the river without cost, whether for private equipment and supplies or fees to concessioners. But these are alternative prices for the means to raft the river, and neither constitutes a fee for simple access to it.[8] Allocation by the Park Service is not a denial of "free access" to either group, but a convenient

[8]The legislative history of 16 U.S.C. 3 offers no illumination of the meaning of its "free access" proviso. See *e.g.* H. R. Rep. No. 64-700, 64th Cong., 1st Sess. 3, 5 (1916). We agree that the natural thrust of its language is to prevent "commerical control of areas containing natural wonders," and fees to private parties for simple access to public property (see 79-1447 Pet. 10).

means of accommodating their divergent interests and abilities.[9]

3. Nor does the allocation violate 16 U.S.C. 20. Assuming that a rafting enterprise is "development" within the meaning of 16 U.S.C. 20, the venture is "necessary and appropriate" to enjoyment of the river, and commercial operators are "necessary and appropriate" to any enjoyment at all for those who are unequipped to run the river themselves.

4. The Park Service is bound to manage the national parks in a manner that takes into consideration the interests of the whole public and not just a segment thereof. The methods it has chosen here are consistent with that obligation, and within its statutory authority. The interim management plan, and its allocation of use, were, as both district courts found (79-1425 Pet. App. D-6 to D-7), rationally based on actual use in 1972. But the court of appeals, in our view, correctly found that further consideration of petitioners' complaint as to the specifics of the interim plan was mooted by adoption of the final

[9]Petitioners trivialize the river-running experience in comparing the allocation challenged here to a requirement that "70% of the tourists sightseeing on the [Washington D.C.] Mall" use a commercial guide (79-1447 Pet. 13-14). As the *Eiseman* district court found (433 F. Supp. at 1106):

> Running the River is not like standing on a viewpoint enjoying the Grand Canyon scene. It is clear that there is a far greater demand to ride the River with a concessionaire's professional pilot and guide than demand for noncommercial private trips. This is true historically and because of the obvious dangers involved in running a wild river and the limited number of people with the equipment, experience and qualification to "go it alone."

Colorado River Management P.an. with its substantially increased allocation of river use to noncommercial river runners (*supra*, pages 6, 9 note 7).

The current plan apparently does not satisfy petitioners. Indeed, it has recently been challenged by concessioners as well.[10] We submit, however, that the reasonable approach of the Park Service to the necessity of allocating river use for the benefit of the whole public, by successive approximations if necessary,[11] fully deserves the deference it received below. *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965).

---

[10]The program to phase out use of motorized watercraft on the river over a five-year period (Colorado River Management Plan, at 15) is now in litigation. *Mountain States Legal Foundation, et al.* v. *Whalen, Director, National Park Service, et al.*, Civ. No. 80-0233 (D. Ariz., filed Mar. 28, 1980).

[11]The present allocation is not immutable, but subject to review and adjustment:

> The allocation ratio is, because of the above factors, a best estimate based on experience and interpretation of the available data. This ratio will be reviewed and adjusted as more reliable information becomes available.

Colorado River Management Plan, at 21.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

JACQUES B. GELIN
MARTIN W. MATZEN
Attorneys

MAY 1980